Remarks on the European Parliament's proposal to ban Heavy Fuel Oils in the Arctic

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Decision commented on: European Parliament resolution of 16 March 2017 on an integrated European Union policy for the Arctic (2016/2228(INI))

The carriage in bulk as cargo or carriage and use as fuel of heavy grade oils by ships in the Antarctic area (sea area south of latitude 60°S) has been prohibited since 2011 under Regulation 43 of MARPOL Annex I, later amended to include use as ballast. Partly inspired by this measure, the European Parliament (EP) adopted, on March 16th 2017, a resolution on an integrated European Union (EU) policy for the Arctic. This resolution looks at many issues related to that region, one of them being the use of heavy fuel oil (HFO) in maritime transport.

This expression of concern in the EP is not unprecedented. In 2014 a motion for a resolution submitted by some Members of the EP (MEP) was already calling on the European Commission (EC) "to promote strict limits on the use and carriage of heavy fuel oils (HFO) in the Arctic". At the time, the motion affirmed that there was an "absence of adequate international measures" and that, as a consequence, the EC should consider adopting rules to be applied to "vessels calling at EU ports". Because these rules aim at "protection of the environment", they would have been, in the eyes of these MEP, a case of acceptable unilateralism. This motion was rejected and hence this particular proposal did not make its way into the resolution on the EU strategy for the Arctic which was adopted by the EP that year.

The EP resolution approved this year does contain elements of that motion. It provides an overview of existing multilateral fora and instruments, highlighting the deference of EU law to the primacy of these instruments; and it refers to the applicable principles of the law of the sea, such as freedom of navigation and innocent passage. But this time the EP went so far as to "call on the Commission and the Member States to take all necessary measures to facilitate actively the ban on the use and carriage of HFO as ship fuel in vessels navigating the Arctic seas". What is more, the resolution clarifies that this ban would be achieved "through the International Convention for the Prevention of Pollution from Ships (MARPOL Convention), and/or through port state control" and "as regulated in the waters surrounding Antarctica".

This particular proposal of the resolution reveals the same unilateral temptation demonstrated with Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, whereby the EU regulated shipping CO_2 emissions, ahead of the International Maritime Organization (IMO), and precisely through port state control. Consequently, the application of such ban raises similar legal questions with regards to jurisdiction in international law. Keeping in mind that there is as yet no final and binding document and that this EP resolution is merely a first stage in a long regulatory process, three remarks can already be made, which then lead to a question.

Firstly, the conduct targeted by the EP resolution ("use and carriage of HFO as ship fuel in vessels navigating the Arctic seas") takes place beyond the maritime zones of its member states. In that sense, the conduct can properly be defined as 'extraterritorial', as it occurs

outside of the port and also arguably beyond the state's functional jurisdiction under international law instruments such as the United Nations Convention on the Law of the Sea (UNCLOS). The EP acknowledges this reality noting that "the waters around the North Pole are mostly international waters".

Secondly, the EP resolution does not consider the moment when the conduct actually occurs but it rather targets ships when "calling at EU ports subsequent to, or prior to, journeys through Arctic waters". Thus member states will consider past or future conduct of the ship to frame the illicit conduct that leads to the consequent ban. In that sense, this is an exercise of prescriptive jurisdiction, performed under the capacity to act as a port state, and which takes into account that particular extraterritorial conduct of the ship, all the while relying upon a territorial factor: the call, entry and presence of the ship in the port, and the information provided about the journey.

Thirdly, the right to deny entry into the port based on past or future conduct in the Arctic does not stem from any multilateral entitlement. The IMO has not yet regulated this matter in the Polar Code (which merely says that "[s]hips are encouraged to apply regulation 43 of MARPOL Annex I when operating in Arctic waters), and it has also not been dealt with elsewhere. The fact that the standards to be set by the EU would arguably be those already in place in the Antarctic, as the 28th paragraph of the preamble of the EP resolution hints at, might well increase the likelihood of their acceptance in upcoming international negotiations. Yet, from a purely legal perspective, the existing standards do not provide any entitlement for port state jurisdiction with regards to HFO in the Arctic. This means that any EU legislation on this matter would be a case of unilateral jurisdiction.

The question to be asked is then: how will the European Union's member states argue their right to act unilaterally as port states, namely by restricting entry into or exit from port to foreign ships, on the basis of conduct occurring outside of their maritime zones? It is also unclear for now how they will establish a legally relevant connection between that conduct in the Arctic and their own jurisdictional rights. In particular, how might that be done in a way that the port state implementing the ban may lawfully interfere with the jurisdiction of the flag state in a matter otherwise related to the navigation of its ships.

One possibility is to request information on bulk content and fuel on board the ship upon the moment of the call and pending the authorization to enter the port. The port state has the right to request that information as an entry condition, but no multilateral instrument provides the right to ban the entry on the basis of the information provided as a result of that request. Indeed, the UNCLOS, in Article 211(3), recognizes that port states have a right to set particular requirements for the prevention, reduction and control of pollution of the marine environment; but this Article says little about the scope and limits of that right, which are arguably a matter of customary international law.

This proposal of the EP resolution illustrates the enduring relevance of customary principles of state jurisdiction in international law in helping to cover the jurisdictional gaps in the text of treaties such as MARPOL and the UNCLOS. It also illustrates the insufficiency of these principles in conferring jurisdiction geared towards what is perceived by a regulator, be it the EU or a state, as a 'common concern'. Indeed, in the parliamentary debate where the report which contained the proposal for this resolution was discussed, EU Commissioner Julian King acknowledged that "[t]he challenges that our oceans face today do not recognise national boundaries", whilst MEP Sirpa Pietikäinen, the *rapporteur*, noted that "the Arctic (…) is a common heritage". It is true that the other *rapporteur*, MEP Urmas Paet, argued that

"it should be very clear that the EU has to stick very strongly to international law whatever the developments in the Arctic area", but this does not mean ignoring that state practice plays a role in developing customary norms. Actually, it appears, from Regulation 2015/757 and now from this proposal, that the European Union is seeking new ways to interpret customary principles of jurisdiction so as to extend its regulatory reach and provide legal protection for such concerns.

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